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Lucent Technologies
Bell Labs Innovations



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April 15, 1997

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APR 15 1997

Federal Communications Commission
Office of Secretary

96-98

By Hand

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CCB Pol 97-4; CC Docket No. 96-98/Petition of MCI for Declaratory Ruling

Dear Mr. Caton:

Enclosed please find an original and five (5) copies of Lucent Technologies Comments for filing in the above-referenced proceeding. Also enclosed is a copy to be stamped and returned for our files.

Please do not hesitate to contact me should there be any questions.

Sincerely,

Gena L. Ashe
Gena L. Ashe

Enclosure
cc: by hand:

Janice Myles, CCB
ITS, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1997

Federal Communications Commission
Office of Secretary

In the Matter of

Petition of MCI
for Declaratory Ruling

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File No. CCBPol 97-4
CC Docket No. 96-98

Comments of Lucent Technologies Inc.

Lucent Technologies Inc. ("Lucent") hereby submits its Initial Comments in response to the Petition for Declaratory Ruling, CCBPol 97-4 (March 11, 1997), filed by MCI Telecommunications Corp. ("MCI"), in which MCI requests the FCC to rule that new entrants need not obtain separate license or right-to-use agreements before purchasing access to unbundled network elements or reselling services of incumbent local exchange companies ("LECs").

I. LUCENT'S INTELLECTUAL PROPERTY IS ONE OF ITS MOST VALUABLE ASSETS AND THEREFORE, ITS PROTECTION IS PARAMOUNT.

Lucent's intellectual property serves as the basis of its innovations relating to products and services of all kinds, and is therefore one of the Company's most valuable assets. Accordingly, Lucent licenses its intellectual property to users and purchasers of its equipment very carefully, and upon reasonable terms, conditions and restrictions as deemed appropriate by Lucent to protect its investment.

Lucent fully recognizes the Commission's interest in promoting local competition and its desire to avoid the placement of undue burdens on new entrants in accessing incumbent LECs' unbundled network elements or reselling incumbents' services. However, Lucent strongly believes that Commission policies to promote those interests may not, in any way, encroach upon vendors' rights in their intellectual property.

II. GENERALLY, NO ADDITIONAL LICENSE AGREEMENTS OR FEES SHOULD BE REQUIRED FOR A COMPETING LOCAL EXCHANGE CARRIER'S RESALE OF INCUMBENTS' SERVICES OR ACCESS TO UNBUNDLED NETWORK ELEMENTS.

The two broad categories of intellectual property which could be implicated by providing access to unbundled network elements or resale of services and/or features are patents and software. As a general premise, Lucent does not believe that additional license agreements or fees are necessarily required by a competing local exchange carrier ("CLEC") for the resale of service or access to unbundled network elements pursuant to Section 251 of the Communications Act of 1934, as amended, ("the Act") and the FCC's Order in CC Docket 96-98.¹ However, because of the increasingly complex and uniquely tailored contractual relationships Lucent has with its customers, Lucent is unable to make any absolute general statement regarding the need for additional license agreements vis-

¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996). The CLEC use at issue is that set forth in Section 251 of the Act. Per the above referenced Order and Section 251 of the Act, an incumbent is required to provide "access to network elements on an unbundled basis", which has been interpreted by the Commission to mean that incumbents must provide access to the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee. Section 251 of the Act also requires the incumbent to offer for resale, at wholesale rates, any telecommunications service the incumbent LEC offers to end users at retail.

à-vis unbundling or resale of services by CLECs. Lucent does, however, offer the following guidance.

Whether a vendors' intellectual property rights are implicated, and, in turn, additional licenses or right-to-use agreements are required, is a function of: 1) the nature of the intellectual property included in the element to which access is being provided or the service which is being resold; 2) the applicable intellectual property or contract law; 3) the scope of the use restrictions placed on the intellectual property by the vendor at the time of sale of the equipment or licensing of software to the original licensee; and 4) the nature of the access and use contemplated by the CLEC when it purchases access to unbundled elements or resells services. Thus, in any given situation, the governing law and the individual licensing agreements applicable to the original equipment sale and/or intellectual property license in conjunction with the use contemplated by the CLEC will be the primary determinant of what, if any, additional licensing arrangement is required.

A. SOFTWARE

As a general premise, Lucent's right-to-use licenses for software provide, among other restrictions, a personal non-transferable right to the incumbent LEC to use such software for its "own" or "internal" business purposes. Lucent believes that, while the personal non-transferable aspects of the license preclude the transfer or replication of said software without Lucent's consent, an incumbent's provision of resold services or access to unbundled network elements in accordance with Section 251 of the Act generally constitutes such incumbent's "own" or "internal" business purposes and, as such, would not automatically require an additional license agreement or fee.

Notwithstanding this position, the Commission must preserve Lucent's right to protect its intellectual property against use by any entity, whether a CLEC or incumbent LEC, in a manner which exceeds the scope of the originally issued license grant, without due and just remuneration. This protection may include, but is not limited to, additional license terms, additional license fees and non-disclosure terms, as appropriate.

For example, in some instances, software licenses may contain provisions limiting the use of the software beyond a certain capacity (i.e. number of users; number of minutes, etc.). If a CLEC's resale of services or access to unbundled network elements results in use by end-users beyond the capacity for which the software was originally licensed, then either the scope of the license must be expanded or a new license issued. In either case, the vendor would retain the right to charge additional license fees for such expanded use.

Another example includes Lucent's software development platforms licensed to customers for their use in developing telecommunications applications. Use of the software development platform by a CLEC to develop its own applications would be outside of the scope of the original license grant to the incumbent LEC and thus, a separate license agreement would be required.

B. PATENTS

When customers purchase equipment or license software, they typically are not granted express licenses under any patents, but do receive an implied license under the vendor's patents to use the equipment or software in accordance with its intended operation. While it is neither Lucent's desire nor its intent to impliedly license any such

patents to CLECs by virtue of a CLEC's reselling services or having access to incumbents' unbundled network elements, accessing unbundled network elements or reselling services alone does not necessarily require the CLEC to obtain patent licenses from the vendor. There are, however, circumstances under which use of unbundled network elements or resale of services may be a contributing factor to a patent infringement. In such instances, it would trigger the need for the CLEC to obtain a patent license agreement.

For example, if a CLEC combines unbundled network elements of an incumbent with elements of its own network or elements obtained from third parties to form an infringing combination, a separate patent license agreement would be required. Likewise, to the extent a CLEC may be permitted under the FCC's Order to offer unbundled patented network features or functions in combination with resold services, it might also infringe patent rights, in which case a separate patent license agreement would be required.

III. COMMISSION PRO-COMPETITIVE POLICIES SHOULD NOT ENCROACH UPON A VENDOR'S RIGHTS TO PROTECT ITS INTELLECTUAL PROPERTY AGAINST MISUSE AS APPROPRIATE AND PERMISSIBLE BY LAW.

Lucent recognizes the Commission's interest in promoting local competition and its desire to avoid the placement of undue burdens on the entry of CLECs. Lucent believes, however, that the Commission's goals can be attained without encroaching upon a vendor's rights in its intellectual property. As stated previously, Lucent believes that it should not be necessary for CLECs to obtain separate licenses simply to resell

incumbents' services or obtain access to unbundled network elements pursuant to Section 251 of the Act, the FCC's Order in Docket No. 96-98, or an analogous state or local regulatory commission order.

There may be, however, circumstances when it may be necessary and appropriate for CLECs to obtain additional or expanded licenses from equipment vendors or software vendors. These circumstances vary by contract terms and are dependent upon the nature of the intellectual property, the restrictions placed on the intellectual property in the relevant contract, and most importantly, the contemplated use by the CLEC.

Clearly in situations where a CLEC's use, whether pursuant to resale, access to unbundled network elements or otherwise, is beyond the scope of the original license or causes the originally intended license restrictions to be violated, an expanded or separate license would be required. Therefore, any Commission policies should not interfere with vendors' legal rights to protect their intellectual property and should preserve the vendors' rights to require additional licenses as may be necessary and appropriate to protect intellectual property from past, present or future misuse.

IV. CONCLUSION

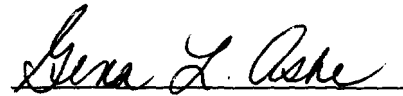
For the foregoing reasons, the Commission should not issue any Declaratory Ruling that a requirement of an additional license agreement for intellectual property underlying unbundled network elements is a de facto violation of Sections 251 and 253 of the Act.

While Lucent's position is as set forth herein, this should in no way be construed as a waiver of Lucent's rights to protect its intellectual property as it deems necessary and

appropriate to accommodate the changing needs of the business. Additionally, it is critical in this era of telecommunications evolution to note that, as technology advances and market conditions change, Lucent must preserve its right to adjust its licensing practices accordingly.

Respectfully Submitted,

LUCENT TECHNOLOGIES INC.

A handwritten signature in cursive script, reading "Gena L. Ashe", is written over a horizontal line.

GENA L. ASHE
Corporate Counsel

MARY MCMANUS
Public Affairs Director

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